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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-71

KENNETH W. WARREN,

Petitioner,

NEW ENGLAND BAPTIST HOSPITAL,

Co-defendant,

against

ELAINE ROSENTHAL, as Executrix of the Estate of Martin C. Rosenthal, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
The Orders and Opinions Below	2
Basis of Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	4
Statement	6
Reasons for Granting the Writ	7
Conclusion	14
APPENDIX A—Order and Opinion of District Court Granting Summary Judgment Dismissing Affirmative Defense	15
Order Amending Prior Order 28 U.S.C. Sec. 1292(b)	22
Order Permitting Appeal	24
Opinion of the Court of Appeals	25
Order Docketed as a Judgment	46
Order Denying Rehearing	48
Order Denying Rehearing in Banc	49

TABLE OF CASES

Babcock v. Jackson, 12 N.Y. 2d 473	8, 10
Bannowsky v. Krauser & Community Hospital, 294 F. Supp. 1204 (U.S.D.C., D. Colo. 1969)	10
Ciprari v. Servicos Aeros Cruziero, 245 F. Supp. 819 (S.D.N.Y. 1965), aff'd 359 F. 2d 856 (2d Cir. 1966)	9, 10

PAGE

Dym v. Gordon, 16 N.Y. 2d 128 (1965) 9, 11

Gaudette v. Webb, —— Mass. ——, 284 N.E. 2d 222 (1972) 3, 12, 13

Gore v. Northeast Airlines, 373 F. 2d 717 (1967) 8

Hughes v. Fetter, 341 U.S. 609, 95 L. Ed. 1212 7

Kilberg v. Northeast Airlines, 9 N.Y. 2d 34 (1961) .. 8, 10

Long v. Pan American Airways, 16 N.Y. 2d 337 (1965) 8, 9

Neumeier v. Kuehner, 21 N.Y. 2d 121 (1972) 10

Pearson v. Northeast Airlines, Inc., 309 F. 2d 553 (en banc) (1962) 7, 8, 10, 12

Pryor v. Swarner, 445 F. 2d 1272 (2d Cir., 1971) 9

Seider v. Roth, 17 N.Y. 2d 111, 216 N.E. 2d 312, 269 N.Y.S. 2d 99 (1966) 6

Thayer v. Perini Corp., 303 F. Supp. 683 (U.S.D.C. D. Rhode Island 1969) 10

Tooker v. Lopez, 24 N.Y. 2d 569, 21 N.Y.S. 2d 519 (1969) 11

STATUTES CITED

28 U.S.C. 1254(1) 2

28 U.S.C. 1292(b) 2

28 U.S.C. 1738 ..... 4, 5

United States Constitution

Article IV, Section 1 4

Article IV, Section 2 4

Amendment XIV, Section 1 4

PAGE

New York State Constitution

Article 1, § 16 5

17B, McKinney's Consolidated Laws of New York, Estates, Powers and Trusts Law, § 5-4.3 6

Wrongful Death Statute of The Commonwealth of Massachusetts, Massachusetts General Laws, Chap. 229 § 2, 1959 ..... 3, 5

MISCELLANEOUS

Reese, Cornell Law Review Vol. 57 (Feb. 1972) 329 .. 14

Twerski, Neumeier v. Kuehner, The Hofstra Law Review Vol. 1, No. 1, Spring 1973 pp. 104, 124 ..11, 12

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ELAINE ROSENTHAL, as Executrix of the Estate of Martin C. Rosenthal, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Kenneth W. Warren, prays that a Writ of Certiorari to review the order of the United States Court of Appeals for the Second Circuit, docketed as a judgment on the 9th day of April 1973, which affirmed, with one judge dissenting, the order of the United States District Court for the Southern District of New York entered on the 22nd day of March, 1972, as amended by the order of that District Court entered the 5th day of May, 1972.

The Orders and Opinions Below

The Order and Opinion of the District Court (Croal
D.J.), which granted summary judgment in favor of t
plaintiff striking Petitioner's affirmative defense based
the Massachusetts Wrongful Death Statute limiting
coverable damages, is printed in Appendix A hereto p.
and is reported at 342 F. Supp. 246 (S.D.N.Y., 1972).

The Order of the District Court (Croake, D.J.) amer
ing its prior order so as to include the statement prescrib
by 28 U.S.C. Sec. 1292(b) is unreported and is printed
Appendix A hereto at p. 22.

The Order of the United States Court of Appeals for t
Second Circuit granting leave to appeal pursuant to
U.S.C. Section 1292(b), one judge dissenting, is unreport
and is printed in the Appendix A hereto at p. 24.

The opinion of the Court of Appeals affirming the ord
of the District Judge, one judge dissenting, is printed
Appendix A hereto at p. 25 and is reported at 475 F.
438 (CCA 2 Cir. 1972).

The Order of the United States Court of Appeals for t
Second Circuit, docketed as a judgment, is printed at A
pendix A hereto at p. 46.

The Order of the Court of Appeals denying a petiti
for rehearing, one judge dissenting, is printed at Append
A, p. 47.

The Order of the Court of Appeals denying a suggesti
for an in banc rehearing is printed at Appendix A, p.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U
Sec. 1254(1).

Questions Presented

The pertinent and conceded facts were succinctly and accurately summarized by the Court of Appeals (475 F.2d 439, 440):

> "The decedent, Dr. Martin C. Rosenthal, was a citizen of New York. Decedent and his wife, who as executrix is plaintiff here, went to Boston where he was examined and diagnosed by Dr. Warren, whom the plaintiff describes as a world-renowned physician and surgeon treating patients from all over the world. On March 27, 1969, eight days after an operation performed by Dr. Warren at the New England Baptist Hospital, decedent died in the hospital while under the care of the defendant Warren."

Petitioner's answer to the first count of the complaint based on decedent's death included as an affirmative defense the Wrongful Death Statute of the Commonwealth of Massachusetts (Massachusetts General Laws, Chap. 229 § 2, 1959) which provided:

> "A person who (1) by his negligence causes the death of a person in the exercise of due care, * * * shall be liable in damages in the sum of not less than Five Thousand Dollars nor more than Fifty Thousand Dollars, to be assessed with reference to the degree of his culpability * * *."*

This first cause of action has its root in the aforesaid Wrongful Death Statute of Massachusetts.**

The order below, docketed as judgment, affirmed the dismissal of this affirmative defense and thus decided that

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* This Statute has since been amended to provide an upper limit of $100,000.

** Cf. *Gaudette* v. *Webb*, —— Mass. ——, 284 N.E.2d 222 (1972).

the extent of a possible verdict in this action would be determined by the New York Death Statute with its absence of limit.

The questions presented therefore are:

1. Should this Court, by granting a Writ, review whether, in an action arising under the Wrongful Death Statute of Massachusetts, on the facts of this case, a refusal to enforce the measure and limitation of damages in such statute provided is violative of the Full Faith and Credit Clause of the United States Constitution, Article IV Section 1, and its implementing statute. 28 U.S.C. § 1738 and constitutes a deprivation of property without due process of law within the meaning of Amendment XIV, Sec. 1 of the United States Constitution?

Constitutional Provisions and Statutes Involved

The provisions of the United States Constitution involved are:

Article IV, Section 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article IV, Section 2:

"The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, Section 1:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any per-

son of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The federal statutory provisions involved are:

28 U.S.C. § 1738:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

* * * *

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the Courts of such State, Territory or Possession from which they are taken."

Mass. Gen. Laws, Ch. 229, Sec. 2 (1959), provided in pertinent part:

"Damages for Death By Negligence, etc.; General Provisions. A person who (1) by his negligence causes the death of a person in the exercise of due care * * * shall be liable in damages in the sum of not less than five thousand nor more than fifty thousand dollars, to be assessed with reference to the degree of his culpability * * *."

The provision of the Constitution of the State of New York involved is:

Art. 1, § 16.

"The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

The N.Y. State statutory provision involved is found at 17B, McKinney's Consolidated Laws of New York, Estates, Powers and Trusts Law, § 5-4.3 which provides in pertinent part:

> "The damages awarded to the plaintiff may be such sum as the jury * * * deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. * * *"

Statement

Action was originally brought in the Supreme Court of the State of New York, County of Westchester, where, although plaintiff named both Dr. Warren and The New England Baptist Hospital as defendants, jurisdiction was obtained only of the hospital by the service of process upon one of its officers in New York City. That defendant ultimately removed the action to the Federal District Court on the basis of diversity and was assigned index number 71 Civ. 855.

Quasi in rem jurisdiction of the Dr. Warren phase of this case was obtained by the attachment of an insurance policy issued by the St. Paul Fire and Marine Insurance Company, a Minnesota corporation doing business in New York, to a Massachusetts clinic where Dr. Warren is employed (under authority of *Seider* v. *Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966)). The complaint thus served named only Dr. Warren as a defendant and issued out of United States District Court for the Southern District of New York under index number 71 Civ. 697. The allegations of the complaints served upon each of the defendants are identical. Thereafter, the two actions were consolidated under index number 71 Civ. 697.

The complaint sets forth two causes of action, the first is for the alleged wrongful death of plaintiff's decedent

and seeks damages of $1,150,000 and the second is for decedent's alleged pain and suffering and seeks damages of $100,000. Only the first count is here involved since the affirmative defense in issue was directed only at that cause of action.

Reasons for Granting the Writ

This Court stated in *Hughes* v. *Fetter,* 341 U.S. 609, 611, 95 L.Ed. 1212, 1216:

> "We have recognized, however, that full faith and credit does not automatically compel a foreign state to subordinate its own statutory policy to a conflicting public act of another state; it is for this Court to choose in each case between the competing public policies involved."

In *Pearson* v. *Northeast Airlines, Inc.,* 309 F.2d 553 (en banc) (1962), this Court, by denying certiorari (372 U.S. 912, 1963), declined to make such choice between the competing public policies of Massachusetts and New York. Since Pearson dealt with the same public policies which are here in conflict, why then should this Court now grant the requested writ? We suggest that there now exist cogent reasons which we trust are compelling.

In *Pearson,* the majority, in deciding that on its facts the public policy of New York should prevail over that of Massachusetts, stated at 309 F.2d 561:

> "We may concede that the Wrongful Death Statute of Massachusetts, almost certainly designed with an eye toward the regulation of occurrences transpiring wholly within Massachusetts, should be honored fully and completely when the incident under litigation is a local one. Such, we take it, is the import of Home Insurance Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930). But we cannot concede that Massa-

chusetts has a constitutionally protected claim to the unqualified application of its statute in cases with an overwhelmingly interstate flavor.'"*

In this context, it is emphasized that in the instant case:

1. The alleged malpractice occurred in Massachusetts.

2. Dr. Warren, the alleged tortfeasor, is a Massachusetts resident.

3. The hospital in which the alleged malpractice took place is in Massachusetts.

4. The insurance policy, the attachment of which gave New York quasi in rem jurisdiction in this action, was issued to a Massachusetts institution by the Boston office of a Minnesota corporation.

5. The presence in Massachusetts of plaintiff and her decedent and the fact that the alleged malpractice occurred in Massachusetts were not fortuitous circumstances** but rather resulted from decedent's deliberate choice.

The fact that Dr. Warren was described "as a world-renowned physician and surgeon treating patients from all over the world" could hardly be the ground upon which his affirmative defense of the Massachusetts Wrongful Death Statute was stricken. Surely, were the doctor a surgeon of more limited reputation, the decision of the

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* Judges Friendly, Lumbard and Moore disagreed in a well reasoned opinion (309 F.2, 564 thru 569) which we will urge upon this Court should this writ be granted.

** Cf. *Kilberg* v. *Northeast Airlines*, 9 N.Y. 2d 34 (1961); *Pearson* v. *Northeast Airlines*, 309 F.2d 553 (1962); *Gore* v. *Northeast Airlines*, 373 F.2d 717 (1967); *Babcock* v. *Jackson*, 12 N.Y. 2d 473 (1963); *Long* v. *Pan American Airways*, 16 N.Y. 2d 337 (1965).

majority would not have been different. (Nor could the decision below have been opposite if the hospital were also of limited reputation.)

We respectfully urge, as does Judge Lumbard in his dissent, that "the sole interest that it (the majority) has found in New York emanates from the facts of plaintiff's and decedent's New York residence" and that "New York's only connection with this occurrence was the permanent residence in New York" (475 F.2d 447, 448).

We respectfully suggest that here we meet a case that clearly does not have the "overwhelmingly interstate flavor" of Pearson and similar cases. Rather here, there is an overwhelmingly local flavor. Applicable, we urge, is the statement of principle in Pearson (309 F.2d 561), a principle with which all nine judges were in unanimous agreement:

> ". . . the Wrongful Death Statute of Massachusetts (was) almost certainly designed with an eye toward the regulation of occurrences transpiring wholly within Massachusetts (and) should be honored fully when the incidnt under litigation is a local one. Such, we take it, is the import of Home Insurance Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930)."

Here, for the first time, we believe, is presented the question of whether the mere fact that a plaintiff is a resident of the forum state, the interests of that state will under all circumstances outweigh those of the state of the tort so that in all such cases the limitations on the extent of verdict or the guest statutes of the states of the tort will be supervened.

We respectfully suggest that the decision in this case appears to be in conflict with the decisions in *Pryor* v. *Swarner*, 445 F.2d 1272 (2d Cir., 1971); *Dym* v. *Gordon*, 16 N.Y. 2d 128 (1965); *Ciprari* v. *Servicos Aeroes Cruziero*,

245 F.Supp. 819 (S.D.N.Y. 1965), aff'd 359 F.2d 856 (2d Cir. 1966); *Bannowsky* v. *Krauser & Community Hospital*, 294 F. Supp. 1204 (U.S.D.C., D.Colo. 1969); and *Thayer* v. *Perini Corp.*, 303 F.Supp. 683 (U.S.D.C. D.Rhode Island 1969), all of which applied lex loci de delicti despite the fact that in each the plaintiff was a resident of the forum state.

We urge that the requested writ be granted that guidance may be given to the courts of the several States so that they not transgress constitutional inhibitions, if indeed so favoring the resident of the forum state is, in law, such a transgression.

We respectfully suggest that the courts of the several states, and the federal courts applying the choice of law rules of such states, would benefit from a review by this Court of the decision below regardless of whether it be one of reversal or affirmance.

The break with the unwavering application of *lex loci delicti* was foreshadowed by dicta in *Kilberg* v. *Northeast Airlines*, 9 N.Y. 2d 34, 172 N.E. 2d 526, 211 N.Y.S. 2d 133 (1961). The *Pearson* case which dealt with the same accident as Kilberg, reached its decision not to apply the Massachusetts Wrongful Death Statute's limitation relying on the Kilberg dicta. This Court denied certiorari in that case in 1963.

Thus, with the Pearson decision and that of *Babcock* v. *Jackson*, 12 N.Y.2d 473, 240 N.Y.S. 2d 743 (1963) ended the era of predictability in cases involving torts committed in one state but litigated in another. In reaching their decisions, the courts moved from a "center of gravity theory" to a "contacts theory" to an "interest analysis" and to the most recent decision of the New York Court of Appeals, *Neumeier* v. *Kuehner*, 21 N.Y.2d 121 (1972).

which has been described as having "turned its back on pure interest analysis".* Neumeier in an attempt to provide same degree of predictability, set forth a series of three rules to guide future decisions involving guest statutes. There would seem to be no reason why such rules could not apply to cases involving death statutes with equal validity.

In the intervening eleven years since Pearson, decisions have been many, often inconsistent and even contradictory. Thus, *Dym* v. *Gordon*, 16 N.Y.2d 128, 262 N.Y.S. 463 (1965) and *Tooker* v. *Lopez*, 24 N.Y.2d 569, 301 N.Y.S.2d 519 (1969) reached opposite conclusions on essentially the same facts.

In addition to inconsistent decisions, with their frequent concurring and dissenting opinions, the intervening years have also witnessed a spate of law review articles and symposiums, again with expressions of varying and often conflicting views. The criticism of the opinion below by Prof. Twerski (in a footnote to his article on Neumeier, Hofstra Law Review, Vol. 1, Spring 1973, p. 124) evidences the need for guidance by this Court.

53. On February 13, 1973 the Second Circuit decided *Rosenthal* v. *Warren*, 169 N.Y.L.J. 40, p. 1, col. 7 (Feb. 28, 1973). A New York physician, Dr. Rosenthal, went to Boston to be treated by Dr. Warren. Following surgery Dr. Rosenthal died. A wrongful death action alleging malpractice was brought against Dr. Warren. Under New York law plaintiff would be entitled to unlimited recovery. Massachusetts law permitted a maximum of $50,000. The issue is whether New York would apply its own law based on nothing more than the fact that the plaintiff (decedent) was a New York resident. The majority found that New York *would*

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*Twerski, *Neumeier* v. *Kuehner*, The Hofstra Law Review Vol. 1, No. 1 Spring 1973 p. 104.

apply its own law. What is crucial is the gross misreading of *Neumeier*. The court differentiated *Neumeier* on the grounds that in *Neumeier* the court made a strong point of the fact that New York had no interest since the plaintiff was an Ontario resident. The Second Circuit paid no attention whatsoever to the second Fuld rule: that a defendant acting solely within his home state should not be subjected to liability if that state does not cast him in liability simply because the victim's state provides for liability. This is the very situation involved in *Rosenthal*. It is disturbing that the Second Circuit failed to discover the significant shift in theory that *Neumeier* portends. If *Neumeier* indeed has shifted choice of law theory the New York court will have to set it forth with greater clarity. Otherwise we are destined to face meaningless distinction after distinction with rules and theory opposing each other and competing for supremacy.

Accordingly, we respectfully suggest that the developments of the years intervening since the denial of certiorari in *Pearson* strongly argue for the granting of the writ here requested.

In its revolutionary decision in *Gaudette* v. *Webb*, — Mass. ——, 284 N.E.2d 222 (1972), the Massachusetts Court reasoned to the conclusion that "it may now be held that the right to recover for wrongful death is of common law origin, and we so hold. To the extent that * * * any other prior decisions of this court conflict with our present holding, those decisions are no longer to be followed."

We respectfully urge that from the perspective of the instant case, the operative words in the above quotation are "it may now be held" and "no longer to be followed". The use of this language makes clear that death actions arising prior to the decision in *Gaudette* were not of com-

mon law origin. Rather, the right to bring such actions was created by the Massachusetts Wrongful Death statute. We suggest that the decision in *Gaudette* was meant to be prospective and not retroactive. In this regard, then, the case here under consideration remains unaffected by Gaudette.

More pertinent, here, however, is the Gaudette holding at 284 N.E.2d 229:

> "Consequently, our wrongful death statutes will no longer be regarded as 'creating the right' to recovery for wrongful death. They will be viewed rather as: (a) requiring that damages recoverable for wrongful death be based upon the degree of the defendant's culpability; (b) prescribing the range of the damages recoverable against each defendant; * * *"

Thus, we see reaffirmed the public policy of Massachusetts to fix limits on the extent of recovery for wrongful death based on the penal concept of degree of culpability. Thus, the public policy of Massachusetts remains in conflict with that of New York with its provisions for damages without limit determined within the compensatory formula of the New York statute.

We have, in this petition, attempted to confine ourselves to giving the reasons we believe this writ should be granted. We have resisted arguing at any length why we believe the decision below to be erroneous and why (even if it correctly reflects what a New York court would hold) it violates the Full Faith and Credit Clause of the U. S. Constitution and constitutes a deprivation of petitioner's property without due process of law.

However, we cannot resist comment on the prevailing opinion's dismissal of the argument below that the parties

intended Massachusetts law to apply. We suggest that the Court there ignored the principle that the expectations of the parties should include "the expectations that they presumably would have had if their minds had been directed to the issue on hand".* Can one seriously doubt that, with his mind directed to the issue, petitioner would have insisted on the applicability of Massachusetts law? Can one seriously believe that plaintiff's decedent would then with his mind directed to the issue, refused to permit Dr. Warren to operate?

Nor can we refrain from directing the Court's attention to the dissenting opinions in both Pearson and in the instant case which, we suggest, are most persuasive to the conclusion that the decision below does indeed violate constitutional provisions.

CONCLUSION

For the foregoing reasons we respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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* Reese, Cornell Law Review Vol. 57 (Feb. 1972) 329.

APPENDIX A

Order and Opinion of District Court Granting Summary Judgment Dismissing Affirmative Defense.

CROAKE, D. J.:

This is a wrongful death action brought by the widow and Executrix of the Estate of Dr. Martin C. Rosenthal for the alleged negligence and malpractice of defendants with respect to Dr. Rosenthal, now deceased. The action is maintained in this court under diversity jurisdiction 28 U.S.C. § 1332.

By this motion plaintiff seeks to strike the affirmative defenses of the defendants based on the Massachusetts Death Statute limiting recoverable damages and/or granting partial summary judgment striking the aforesaid affirmative defenses.

The facts pertinent to this motion are undisputed. The action stems from an operation performd by Dr. Warrent upon Dr. Rosenthal in the New England Baptist Hospital (Hospital) in Boston, Massachusetts. Following an examination and diagnosis by Dr. Warren, Dr. Rosenthal was admitted to the Hospital on March 16, 1969. On March 19, 1969 Dr. Warren performed an operation upon Dr. Rosenthal, and on March 27, 1969, while still in the Hospital, Dr. Rosenthal died.

This Federal court sitting in New York determines this motion concerning a diversity action by applying the choice-of-law rules of the forum state. *Klaxon v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941); *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938); *Patch v. Stanley Works*, 448 F. 2d 483, 487 (2nd Cir., 1971). *Pearson v. North East Airlines*, 199 F. Supp. 539, 540 (S. D. N. Y. 1961).

New York has abandoned the strict choice of *lexi loci delicti* as the test of which state law to apply in tort cases. *Babcock v. Jackson*, 12 N. Y. 2d 473, 191 N. E. 2d 272, 240 N. Y. S. 2d 743 (1963). Though New York has

not been entirely consistent in applying subsequent standards, *Miller v. Miller,* 22 N. Y. 2d 12, 15, 237 N. E. 2d 877, 879, 290 N. Y. S. 2d 734, 738 (1968). The court has indicated that its determination involves consideration of the significant interests which each state may have in the particular issue in question. *Tooker v. Lopez,* 24 N. Y. 2d 569, 249 N. E. 2d 394, 301 N. Y. S. 2d 519 (1969), *Babcock v. Jackson,* 12 N. Y. 2d at 481, 484, 191, N. E. 2d at 275, 240 N. Y. S. 2d at 751 (1963).

By using the significant interests standard, on the issue of whether or not liability exists for an alleged tort, New York has applied the law of the state wherein the alleged tortious conduct occurred. *Babcock v. Jackson,* 12 N. Y. 2d at 483. The court has reasoned that "it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its border, and it would be almost unthinkable to seek the applicable rule in the law of some other place." *Id see Kilberg v. North East Airlines, Inc.,* 9 N. Y. 2d 34, 172 N. E. 2d 526, 211 N. Y. S. 2d 133 (1961); see also *Heaney v. Purdy,* 29 N. Y. 2d 157, 159, 272 N. E. 2d 550, 324 N. Y. S. 2d 47, 48 (1971).

In contrast to the foregoing, the present motion concerns itself with the extent of liability; that is, with the propriety in applying that part of the Massachusetts Death Statute which would limit recovery to ". . . not less than Five Thousand Dollars, nor more than Fifty Thousand Dollars, to be assessed with reference to the degree of his culpability . . ." Mass. Gen. L. Ch. 229, § 2, or applying New York law which places no fixed limit on recovery, N. Y. Estates, Powers & Trusts L. 5-4.3; N. Y. Constitution Article I, § 16. The courts have had occasion to discuss the issue that now confronts this court. *Gore v. Northeast Airlines, Inc.,* 373 F. 2d 717 (2nd Cir., 1967); *Pearson v. Northeast Airlines, Inc.,* 309 F. 2d 553 (2nd Cir.) (*en banc*), cert. denied, 372 U. S. 912 (1962); *Tooker v. Lopez, supra; Miller v. Miller,* 22 N. Y.

2d 12, 237 N. E. 2d 877, 290 N. Y. S. 2d 734 (1968); *Long v. Pan American World Airways, Inc.*, 16 N. Y. 2d 337, 213 N. E. 2d 796, 266 N. Y. S. 2d 513 (1965); *Babcock v. Jackson, supra; Kilberg v. Northeast Airlines, supra.*

In not one of the above-cited cases, nor in any case not cited above but mentioned by the parties, has the New York Court of Appeals applied a statute which would impose a limitation on recovery in an action by a New York plaintiff for the death of a New York decedent.

At the time of Dr. Rosenthal's death, plaintiff, the decedent and their children were domiciliaries of New York. Plaintiff and her children are still domiciled in New York. The estate is being administered in New York. The action against the Hospital was brought in the Supreme Court of the State of New York and removed to this forum on grounds of diversity of citizenship. Plaintiff obtained *quasi in rem* jurisdiction over Dr. Warren by attaching the obligation of his liability insurance policy to defend and indemnify, held by an insurance company with offices in New York. See *Seider v. Roth*, 17 N. Y. 2d 111, 216 N. E. 2d 312, 269 N. Y. S. 2d 99 (1966).

The fact that Massachusetts is the state in which the alleged wrongdoing occurred, where the alleged tortfeasor resides, and where the defendant hospital is located, is not without significance in the present determination. Yet, these factors must be placed in their proper perspective. Neither the Hospital nor the defendant doctor are strictly local entities. The defendant Hospital encouraged and solicited business out of state, including the solicitation of New York residents. According to the 1969 annual report of the Hospital, about one-third of the patients were out of state, and approximately eight per cent were from New York.* The afore-

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*Plaintiff's Exhibits B & C.

said report denotes Dr. Warren as a member of two of the hospital committees, a member of the corporation, and on the Board of Trustees. It is asserted without contradiction that Dr. Warren, currently Surgeon-in-Chief of the Hospital, is a well-known physician and surgeon treating many patients who originate from places beyond the borders of Massachusetts.

New York has expressed its concern as to the limitation of recovery for the death of a New Yorker. Article I, Section 16 of the New York Constitution provides in pertinent part:

> The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.

The New York interest "is vitally concerned with the manner in which the wife and children of a New York decedent will be compensated as a result of the wrongful killing of their 'bread winner.'" *Miller v. Miller*, 2 N. Y. 2d at 18, 237 N. E. 2d at 830, 290 N. Y. S. 2d at 739 (1968). New York recognizes that the financial burden of the New York dependent beneficiaries might ultimately have to be borne by the State of New York. *Miller v. Miller, supra. Thomas v. United Airlines, Inc.*, 24 N. Y. 2d 714, 249 N. E. 2d 755, 301 N. Y. S. 2d 973, cert. denied, 396 U. S. 991 (1969); *Long v. Pan American World Airways, Inc., supra; MacKendrick v. Newport News Shipbuilding and Dry Dock Co.*, 59 Misc. 2d 994, 302 N. Y. S. 2d 124 (Sup. Ct. N. Y. Cty. 1969).

We are thus faced with a matter in which defendants, physically located in Massachusetts, encourage the use of their services and facilities on a nationwide basis. The decedent was and his family are residents and domiciliaries of New York. The decedent availed himself of the special services of the defendants on one occasion,

and this allegedly resulted in his untimely death. The dependent beneficiaries, still residents and domiciliaries of New York, seek protection of their own state law, while the defendants seek protection of their own state law. This court must decide which law would be applied by the state court of the dependent beneficiaries.

The defendants assert that unlike the facts in previous New York court holdings, the location of the alleged wrongdoing is not fortuitous: the decedent intended to be in Massachusetts. Massachusetts, it is contended, has an interest in keeping Professional Liability policy premiums as low as possible for its residents, and Massachusetts has a proper legislative concern for the extent of the recovery awarded against defendants who are residents of that state.

It is obvious that the location of the alleged wrongdoing was not entirely fortuitous, but it is not so clear as to whether the deceased anticipated or even considered, let alone intended the laws of a state other than his own, to restrict the award which his dependent beneficiaries may reecive as a result of a wrongful death action arising from this particular operation. The only intent that is apparent at this juncture of the proceedings is the intent of the defendants to encourage use of their facilities and services, as well as contributions, from persons residing in states other than Massachusetts. The interest that Massachusetts has in keeping insurance premiums as low as possible for its residents is relevant to the preesnt motion but, as with the argument that Massachusetts has an interest in the extent of recovery against defendants who are residents of that state, the assertion is better made in connection with a case dealing with a purely local business concern.

The defendants call the attention of the court to *Ciprari v. Servicaos Aereous Cruzeiro,* 245 F. Supp. 819 (S. D. N. Y.), aff'd 359 F. 2d 855 (2nd Cir., 1965). In *Ciprari, supra,* a New York resident and citizen brought

a diversity action against a local Brazilian airline for personal injuries suffered during an intra-country flight in Brazil. The court held that the Brazilian statute limiting liability applied. The court found that the airline was thoroughly a Brazilian corporation. Its activities in New York did not relate to the solicitation or even the encouragement of passenger business. The defendant did not deal with the public in New York. The court further noted that as the Workmen's Compensation Law of New York was applied in that action, there was "no likelihood of [the plaintiff] becoming a public charge to affect the policy of this State." 245 F. Supp. at 824. The only interest that New York had was the fact that the plaintiff was a resident. The court found that Brazil with an interest that touched upon national policy as well as national security had "the strongest interest in the resolution of the particular issue presented." *Babcock v. Jackson, supra,* at 484, cited in *Ciprari,* 245 F. Supp. at 825.

In contrast to *Ciprari, supra,* it is apparent that the defendants here actively served persons outside of their home state when it was to their advantage. Furthermore, *Dym v. Gordon,* 16 N. Y. 2d 120, 209 N. E. 2d 792, 262 N. Y. S. 2d 463 (1965), relied upon by *Ciprari* as the current New York law, is questionable in light of *Macey v. Rozbicki,* 18 N. Y. 2d 189, 221 N. E. 2d 380, 274 N. Y. S. 2d 591 (1966), and *Tooker v. Lopez, supra.*

Defendants have demonstrated that Massachusetts has an interest in the particular issue before this court, but it cannot be said that the New York courts would find the interests of Massachusetts superior to that of its own interests. Therefore, if this court were to find for the plaintiff, the defendants would not be unlawfully deprived protection of their own laws; nor would there be a "denial to defendant[s] of due process and equal protection which would do violence to the traditional and fundamental concepts of justice." *MacKendrick v.*

Newport News Shipbuilding and Dry Dock Co., 59 Misc. 2d 994, 302 N. Y. S. 2d 124 (Sup. Ct. N. Y. Cty. 1969).

In light of the foregoing decided cases it seems reasonably clear that in the present action New York would not apply the Massachusetts statute as to the limitation of recovery.

As matters outside the pleadings, in the form of affidavits and exhibits, have been submitted by the parties and examined by the court the motion is considered as one pursuant to Fed. R. Civ. P. 56 for partial summary judgment.

Accordingly, partial summary judgment in favor of plaintiff striking the affirmative defenses of defendants based on the Massachusetts Death Statute limiting recoverable damages is granted.

..So Ordered.

Dated: New York, N. Y.
March 22, 1972

THOMAS F. CROAKE

Order Amending Prior Order 28 U.S.C. Sec. 1292(b).

Endorsement

ELAINE ROSENTHAL, as Executrix of the Estate of Martin C. Rosenthal, deceased,

Plaintiff,

v.

KENNETH W. WARREN and NEW ENGLAND BAPTIST HOSPITAL,

Defendants.

71-Civ. 697

On March 22, 1972 the undersigned granted partial summary judgment in favor of plaintiff striking the affirmative defense based upon the Massachusetts Death Statute limiting recoverable damages. Defendants now move to reargue the motion, or, in the alternative, for certification of an interlocutory appeal from the order.

Reargument is sought on the basis of *Silver v. Great American Insurance Co.*, 29 N. Y. 2d 356, 328 N. Y. S. 2d 398 (1972), decided subsequent to the submission of briefs and the oral argument in the instant motion, which concerned the doctrine of *forum non conveniens;* furthermore, defendants allege that the "significant interests standard" has been misapplied.

The nature and background of the action are fully set forth in the memorandum decision of March 22. The motion to reargue is granted; upon a review of all the circumstances, including the submitted memoranda, the decision of this court, dated March 22, 1972, is adhered to.

We are of the opinion that the memorandum decision of March 22 involves a controlling question of law as to whether the highest court of New York State would apply the law of New York, rather than that of Massachusetts, regarding any limitation of recovery in the present action. In addition, as to the controlling question of law, there is substantial ground for difference of opinion and an immediate appeal from the memorandum decision of March 22 may materially advance the ultimate termination of the litigation. It might be noted that as far as we are able to ascertain, this appears to be a matter of first impression as to the limitation of recovery in a malpractice action.

Accordingly, the memorandum decision of March 22 is amended to include the statement prescribed by 28 U. S. C. §1292(b).

So Ordered.

Dated: New York, N. Y.
May 4, 1972

THOMAS F. CROAKE
U. S. D. J.

Filed May 5 1972
U. S. District Court S. D. of N. Y.

Order Permitting Appeal.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of May, one thousand nine hundred and seventy-two

[Same Title.]

It is hereby ordered that the motion made herein by counsel for the petitioner Kenneth W. Warren by notice of motion dated May 10, 1972, for leave to appeal pursuant to 28 U.S.C. § 1292(b) be and it hereby is granted.

May 25, 1972

/s/ Paul R. Hays
/s/ Leonard P. Moore
/s/ J. Joseph Smith
Circuit Judges

I dissent.
/s/ J. Joseph Smith

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 128—September Term, 1972.

(Argued October 31, 1972 Decided February 13, 1973.)

Docket No. 72-1658

ELAINE ROSENTHAL, as Executrix of the Estate of MARTIN C. ROSENTHAL, Deceased,

Plaintiff-Appellee,

v.

KENNETH W. WARREN and NEW ENGLAND BAPTIST HOSPITAL,

Defendants-Appellants.

Before:

LUMBARD, FEINBERG and OAKES,

Circuit Judges.

Interlocutory appeal under 28 U.S.C. § 1292(b) of an order of the United States District Court for the Southern District of New York, Thomas F. Croake, *Judge,* granting partial summary judgment to the plaintiff in a diversity jurisdiction, medical malpractice case and holding that New York, not Massachusetts, law governs on the issue of the amount of damages recoverable.

Affirmed.

SOLOMON M. CHESER, New York, New York, *for Defendant-Appellant Warren.*

DOUGLAS A. BOECKMANN, New York, New York, *for Defendant-Appellant New England Baptist Hospital.*

MELVIN I. FRIEDMAN, New York, New York (Gerald A. Robbie and Alan J. Konigsberg, New York, New York, of counsel), *for Plaintiff-Appellee.*

OAKES, *Circuit Judge:*

This appeal in a diversity case raises the question whether New York would apply a Massachusetts damage limitation to the death of a New York domiciliary occurring in Massachusetts. The appeal, taken before final judgment pursuant to 28 U.S.C. § 1292(b), is from an order of the district court granting partial summary judgment in favor of the plaintiff in an action for wrongful death. The partial summary judgment struck the affirmative defense based upon the Massachusetts wrongful death statute limiting recoverable damages to ". . . not less than Five Thousand Dollars nor more than Fifty Thousand Dollars, to be assessed with reference to the degree of [the tortfeasor's] culpability . . . "[1] The district court held that New York law was applicable. That law places no fixed value on wrongful death or limitation upon the damages in a wrongful death action. N.Y. Estates, Powers & Trust Law, § 5-4.3; N.Y. Const. art. 1, sec. 16. We affirm.

The relevant facts are simple, the legal issue difficult. The decedent, Dr. Martin C. Rosenthal, was a citizen of

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[1] Mass. Gen. L. ch. 229, § 2 (1959).

New York. Decedent and his wife, who as executrix is plaintiff here, went to Boston where he was examined and diagnosed by Dr. Warren, whom the plaintiff describes as a world-renowned physician and surgeon treating patients from all over the world. On March 27, 1969, eight days after an operation performed by Dr. Warren at the New England Baptist Hospital, decedent died in the hospital while under the care of the defendant Warren.

Suit, alleging malpractice and asking for $1,250,000 in damages, was brought in New York state court. Jurisdiction of Dr. Warren to the extent of his insurance coverage was obtained by attachment levied on the St. Paul Fire & Marine Insurance Company, a Minnesota corporation doing business in New York, the malpractice insurer of a clinic where Dr. Warren is employed.[2] Jurisdiction of New England Baptist Hospital, of which Dr. Warren is surgeon in chief, a trustee, a member of the planning committee and an officer of the corporation, was obtained by service upon another officer of the hospital while soliciting funds in New York City. Defendants removed the suit to the federal district court on the basis of diversity of citizenship.

It is undisputed that although the hospital is a Massachusetts corporation, approximately one-third of its patients in 1969 came from outside Massachusetts and approximately 8 per cent of its patients in the same year were from New York. Indeed, the hospital claimed in its 1969 annual report that it was "not a local or community hospital in the usual sense because its patients come from literally everywhere." An affidavit of the head of the casualty underwriting department of the Boston office of St. Paul Fire & Marine, which issued the liability policy under which defendant Warren was covered, indicates that a general surgeon's liability policy in Massachusetts has a

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[2] Jurisdiction was obtained under *Seider* v. *Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

basic limit premium of $192, while a New York City surgeon pays a basic limit premium of $1,139, and that one factor contributing to the difference is the "dollar exposure" in New York, which has no wrongful death limitation. Dr. Warren's policy, however, makes no reference to coverage limitation in wrongful death cases.

This being a diversity case, it is, of course, elemental that we must look to the choice of law rules of the forum state, that is, to New York law. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941); *Patch* v. *Stanley Works*, 448 F.2d 483, 487 (2d Cir. 1971). Formerly New York probably would have applied the law of Massachusetts under the simplistic rule of lex loci delicti. *Baldwin* v. *Powell*, 294 N.Y. 130, 61 N.E.2d 412 (1945); *Whitford* v. *Panama Railroad Co.*, 23 N.Y. 465 (1861). *But cf. Conklin* v. *Canadian-Colonial Airways, Inc.*, 266 N.Y. 244, 194 N.E. 692, 271 N.Y.S. 1107 (1935) (New Jersey death limitation inapplicable to a New Jersey plane crash because the validity of a ticket stipulation for limiting the airline's damages is to be determined by New York law, where the ticket was purchased).

In *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), however, the New York Court of Appeals characterized the Massachusetts wrongful deah limitation as "procedural" and refused to apply it in a suit brought in New York by a New York decedent's estate arising from the crash of an airpline flight originating in New York but fatally ending at Nantucket, Massachusetts. The court said that "[m]odern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move," and pointed out that there were only 14 states limiting death case damages as of that time. 9 N.Y.2d at 39, 172 N.E.2d at 527, 211 N.Y.S. 2d at 135. The court also characterized wrongful death

recovery limitations as "absurd and unjust"[3] and emphasized the strong New York policy against such limitations, at least as to its domiciliaries, enshrined in a constitutional prohibition against them. Said the court, "The absurdity and injustice have become increasingly apparent in the six decades that have followed [the adoption of the New York constitutional prohibition]. For our courts to be limited by [the Massachusetts] damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law. . . ." 9 N.Y.2d at 40, 172 N.E.2d at 528, 211 N.Y.S.2d at 136.

Kilberg foreshadowed New York's total break with the wooden rule that the law of the place of the tort inevitably governed. The break became complete in the landmark *Babcock* v. *Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), where the Court of Appeals chose to apply New York law even though a statute of the place of the tort foreclosed rather than merely limited liability. *Babcock* refused to apply an Ontario statute barring recovery by an automobile guest in the case of an automobile accident in Ontario in which the driver and passenger were New Yorkers. The opinion laid the foundation for an "interest analysis" approach to choice of law problems, looking to "the law of the jurisdiction which, because of

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[3] *See* Justice Hatch in *Medinger* v. *Brooklyn Heights R.R.*, 6 App. Div. 42, 46, 39 N.Y.S. 613, 616 (1896), *quoted in Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y.2d 34, 40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1966). New York, it may be noted, was the first state in this country to enact a statute permitting recovery for wrongful death; it did so in 1847, one year before England adopted Lord Campbell's Act. *See Salsedo* v. *Palmer*, 278 F. 92, 94 (2d Cir. 1921). Ironically, Massachusetts has recently become the first state to hold that there *was* a comomn law right of recovery for wrongful death and that Lord Ellenborough's famous dictum to the contrary *in Baker* v. *Bolton*, 1 Campb. 493, 170 Eng. Rep. 1033 (1808), was erroneous. *Gaudette* v. *Webb*, —— Mass. ——, 284 N.E.2d 222, 226-29 (1972).

its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation." 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. Carefully distinguishing what the court then considered was Ontario's legislative concern over guest-driver collusion against insurers from its interest in regulating the manner in which a driver operates his car, 12 N.Y.2d at 482-83, 191 N.E.2d at 284, 240 N.Y.S. 2d at 750-51, and examining the relative importance of the relationships and contacts of the respective jurisdictions in light of " 'the relevant purposes of the tort rules involved,' " 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S. 2d at 750,[4] the *Babcock* court concluded that application of the inflexible rule of lex loci delicti could lead to "unjust and anomalous results." 12 N.Y.2d at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 751.

Analysis of the respective interests underlying the choice of law applicable in tort cases was soon explicitly extended to ateions for wrongful death. *See Long* v. *Pan American World Airways, Inc.*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965) (applying Pennsylvania law to an air crash where decedents were Pennsylvania residents but

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[4] The *Babcock* "interest analysis" approach has been adopted by other state courts in tort cases. *E.g.*, *Beaulieu* v. *Beaulieu*, 265 A.2d 610 (Me. 1970); *see* Note, *Beaulieu: An Obituary for Lex Loci and an Approach to Interest Analysis*, 23 Me. L. Rev. 239 (1971). *Babcock* was the first and is the leading case in the tort field. *See* Cavers, Cheatham, Currie, Ehrenzweig, Leflar & Reese, *Comments on Babcock* v. *Jackson, A Recent Development in Conflict of Laws*, 63 Colum. L. Rev. 1212 (1963). The New York courts have not followed, or at least have not articulated that they were following, the "Better Rule of Law" approach, first candidly advanced in *Clark* v. *Clark*, 107 N.H. 351, 355, 222 A.2d (1966), and used in *Tiernan* v. *Westext Transp., Inc.*, 295 F. Supp. 1256, 1264 (D. R.I. 1969); *Conklin* v. *Horner*, 38 Wis.2d 468, 483-84, 157 N.W.2d 579, 586-87 (1968); and *Zelinger* v. *State Sand & Gravel Co.*, 38 Wis.2d 98, 110-13, 156 N.W.2d 466, 471-73 (1968).

wreckage landed in Maryland). In *Miller* v. *Miller*, 22 N.Y. 2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968), the New York Court of Appeals faced the question whether to apply a Maine $20,000 limit on wrongful death recovery in the case of a New York resident killed in Maine while a passenger in an automobile driven by a Maine resident. Again the court emphasized the strong New York policy against wrongful death limitations and saw "no substantial countervailing considerations" which would warrant the rejection of New York law, pointing out that the Maine statute did not "regulate conduct" and that "the only justifiable reliance which could be present here would involve the purchase of liability insurance in light of the remedies available to an injured person." 22 N.Y.2d at 19, 237 N.E.2d at 881, 290 N.Y.S.2d at 740. But the court pointed out that standard automobile liability policies issued in Maine drew no distinction between liability coverage for wrongful death and personal injuries, 22 N.Y.2d at 20, 237 N.E.2d at 881, 290 N.Y.S.2d at 740, so that it could not have been purchased in reliance in the Maine wrongful death limitation.

Similarly, in *Tooker* v. *Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), the New York Court of Appeals refused to apply a Michigan guest statute in the case of an automobile accident which occurred on an intra-Michigan trip taken by two New York coeds at Michigan State, one the driver and the other the decedent passenger. Relying upon *Miller* v. *Miller*, *supra*, the court "rejected unequivocally" "[t]he argument that the choice of law in tort cases should be governed by the fictional expectation of the parties." 24 N.Y.2d at 577, 249 N.E.2d at 399, 301 N.Y.S.2d at 526. *Tooker* not merely questioned, it for all practical purposes overruled, *Dym* v. *Gordon*, 16 N.Y.2d 120, 125, 209 N.E.2d 792, 794, 262 N.Y.S.2d 463, 467 (1965), insofar as *Dym* (purporting to rely on *Babcock*) had held that the law of the state with the "most significant relationship to the parties" was to govern. *Tooker* rather looked

to the law of the state with the "superior interest" in having its policy or law applied. *See* 24 N.Y.2d at 574, 194 N.E.2d at 397, 301 N.Y.S.2d at 523. *Tooker* also criticized *Macey* v. *Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966), which, relying on other language of *Babcock*, had seemingly adopted a "contact counting" rather than an "interest analysis" approach to choice of law problems. 24 N.Y.2d at 575, 194 N.E.2d at 398, 301 N.Y.S.2d at 524.

The most recent conflict of laws tort case to reach the New York Court of Appeals, *Neumeier* v. *Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), did hold the Ontario guest law applicable in a suit by an *Ontario* decedent's executrix against a New York driver's estate arising from an accident in Ontario, the court saying that New York has "no legitimate interest in ignoring the public policy of [the] foreign jurisdiction . . . and in protecting the plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders." 31 N.Y.2d at 125-26, 286 N.E.2d at 456, 335 N.Y.S.2d at 68. In no way, however, did the court retreat from the position it had staked out in *Kilberg* and *Miller*, refusing to apply other states' wrongful death limitations in the case of the death of a *New York* domiciliary.[5]

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[5] The *Neumeier* court did not fail to note that if it had been a *New York* domiciliary who was injured, "New York has a deep interest in protecting *its own residents*, injured in a foreign state, against unfair or anachronistic statutes of that state . . . ." 31 N.Y.2d at 125, 286 N.E.2d at 456, 355 N.Y.S.2d at 68 (emphasis added). In fact, when serving as forum for tort litigation in which it is not the domicile of the decedent or his beneficiaries, New York has still generally applied the law of the decedent's domicile on the issue of the extent of liability. *See Thomas* v. *United Airlines, Inc.*, 24 N.Y.2d 714, 249 N.E.2d 755, 301 N.Y.S.2d 973, *cert. denied*, 396 U.S. 991 (1969) (Illinois death action limitation held not to apply to New Jersey, Connecticut and Iowa domiciliaries

(footnote continued on following page)

Seeking to divine New York conflicts law, the federal courts of New York have not always been totally consistent in refusing to apply damage limitations of other states against New York decedents. Two federal cases which did refuse to do so arose out of the same Nantucket crash involved in *Kilberg*. *Pearson* v. *Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962) (en banc), *cert. denied*, 372 U.S. 912 (1963), held that the *Kilberg* rule was "a proper exercise of New York's power to develop conflict of laws doctrine" and not contrary to the full faith and credit clause, U.S. Const. art. IV, § 1, or the due process clause. *Gore* v. *Northeast Airlines, Inc.*, 373 F.2d 717 (2d Cir. 1967), followed the *Kilberg* holding even though the widow and infant children survivors of a New York decedent moved to Maryland a month after the accident and the decedent's adult children lived at all times in California.

In *Ciprari* v. *Servicos Aereos Cruzeiro*, 245 F. Supp. 819 (S.D.N.Y. 1965), *aff'd per curiam*, 359 F.2d 855 (2d Cir. 1966), however, a Brazilian limitation of damages for personal injuries was held to control in the case of a New York domiciliary who bought his ticket in Brazil for an intra-Brazilian trip in a Brazilian airliner. Both the district court, 245 F. Supp. at 824-25, and the court of appeals, which affirmed on the district court's opinion, *see also* 359 F.2d at 856 (Waterman, J., concurring), relied

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(footnote continued from preceding page)

killed in an Illinois plane crash). *Cf. Long* v. *Pan American World Airways, Inc.*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965) (Pennsylvania wrongful death statute applied on behalf of a Pennsylvania decedent not survived by spouse, parent, child or dependent even though Maryland was situs of fatal plane crash and its law barred recovery). *See also Manos* v. *Trans World Airlines, Inc.*, 295 F. Supp. 1170, 1173 (N.D. Ill. 1969) ("The predominant interests to be served on the issue of damages are those of the states containing the people or estates which will receive the recoverable damages, if any, for their injuries or their decedent's death"), *quoted with approval*, *Thomas* v. *United Airlines, Inc.*, *supra*, 24 N.Y.2d at 724, 249 N.E.2d at 759-60, 301 N.Y.S.2d at 979.

heavily on *Dym* v. *Gordon, supra,* since questioned and in substance overruled in *Tooker* v. *Lopez, supra,* and held Brazil to be the jurisdiction most significantly concerned with the law suit.[6]

This review of the relevant case law[7] leaves us with the overwhelming conclusion that, except for a federal case which relied heavily on a discredited state case, the strong New York public policy against damage limitations has triumphed over the contrary policies of sister states in every case where a New York domiciliary has brought suit. This conclusion is particularly striking in wrongful death actions where the New York policy, embedded in a state constitutional prohibition against damage limitations, has without exception been applied in suits brought for New York decedents since *Kilberg.* One might well inquire whether it would be anomalous to permit Dr. Rosenthal's heirs to recover without damage limitation if he died in a plane crash en route to Boston's Logan In-

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[6] *Ciprari* is also factually distinguishable from this case for, as the district court noted:

> This is not a wrongful death case; the public policy of New York to which the majority in Kilberg referred was a public policy applicable to wrongful death cases.

245 F. Supp. at 824. Furthermore, New York's interest in assuring adequate compensation to the *Ciprari* plaintiff was somewhat minimized as he had some recovery for his injuries under New York workmen's compensation law, 245 F. Supp. at 825.

[7] New York lower courts have similary refused to apply out of state limitations to limit recovery for the wrongful deaths of New York domiciliaries. *See MacKendrick* v. *Newport News Shipbuilding & Dry Dock Co.,* 59 Misc.2d 994, 302 N.Y.S.2d 124 (Sup. Ct. 1969) (New York domiciliary resident in Virginia three months killed in a Virginia industrial accident). *Accord, Palmer* v. *Hertz Corp.,* 36 App. Div. 2d 252, 319 N.Y.S.2d 949 (1971); *Tjepkema* v. *Kenney,* 31 App. Div. 2d 908, 298 N.Y.S.2d 175, *appeal denied,* 24 N.Y.2d 942, 302 N.Y.S.2d 580 (1969); *Tickel* v. *Oddo,* 66 Misc. 2d 386, 320 N.Y.S.2d 268 (Sup. Ct. 1971).

ternational Airport (*Kilberg*) or in a taxi cab from Logan to New England Baptist (*Miller*) but not once he stepped into the hospital itself. But to do so would substitute "a domiciliary conceptualism that rested on a vested right accruing from the fact of domicile," *Miller* v. *Miller, supra*, 22 N.Y.2d at 29, 237 N.E.2d at 887, 290 N.Y.S.2d at 748 (dissenting opinion), for New York's sophisticated "interest analysis" approach to choice of law problems. The New York precedents require more.

Appellants contend that Massachusetts is the situs of the events leading to this law suit and, in effect, that the intent, either actual or constructive, of the parties was for the Massachusetts limitation on damages to govern in the event of a malpractice claim. This argument fails for many reasons. Quite probably it never occurred to Dr. Rosenthal, Dr. Warren or to the New England Baptist Hospital that a choice of law problem would arise; at least one does not ordinarily think of wrongful death limitations even when undertaking surgery. This is not a case where the conduct of the Massachusetts doctor or hospital vis a vis the decedent was patterned upon the Massachusetts death limitation. It is therefore not unfair to apply New York's compensatory policy to them. *Cf. Babcock* v. *Jackson, supra*, 12 N.Y.2d at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750-51. Additionally, it cannot be said that the defendants purchased insurance with the expectation Massachusetts law would govern damage recovery in this case. As in *Miller* v. *Miller, supra*, the specific insurance policy here does not distinguish between liability coverage for wrongful death and personal injuries, nor does it distinguish between medical practice on Massachusetts and out of state citizens. Finally, neither the hospital nor the doctor named here as defendants operate provincially; the doctor has a world-wide following and the hospital actively solicits funds from outside the Commonwealth of Massachusetts (including New York) and treats patients from "literally everywhere." It is thus

impossible to say with any certainty what the parties' actual "expectations" as to choice of law were.

Even if expectations, real or constructive, could be hypothesized, they would be legally irrelevant. Despite the argument that looking to the expectations of the parties to solve choice of law problems promotes " 'an unconscious acceptance of legality and the legal order,' " *Miller* v. *Miller, supra,* 22 N.Y.2d at 28, 237 N.E.2d at 886, 290 N.Y.S.2d at 747 (dissenting opinion), this contractual type of approach to multistate tort problems has been "summarily rejected" by the New York Court of Appeals. *Tooker* v. *Lopez, supra,* 24 N.Y.2d at 577, 249 N.E.2d at 399, 301 N.Y.S.2d at 526; *Miller* v. *Miller, supra,* 22 N.Y. 2d at 20, 237 N.E.2d at 881, 290 N.Y.S.2d at 741; *see also* D. Cavers, The Choice of Law Process 119, 302 (1965); Traynor, *Conflicts of Law in Time,* 1967 Duke L.J. 713, 715. It is not without significance in this regard that the "adventitious" element in airline crash cases, mentioned in *Kilberg* and other New York airline crash cases, was given little or no weight in *Miller* and *Tooker.* Looking to the supposed expectations of the parties smacks heavily of the "counting of contacts" approach to conflicts applied in *Macey* v. *Rozbicki, supra,* but disavowed in *Tooker.*

Rather, as we view it, the New York courts would balance against the New York interest in protecting its domiciliaries against wrongful death limitations the interests of Massachusetts in limiting damages for wrongful deaths allegedly caused by Massachusetts citizens or occurring in Massachusetts. Consideration of Massachusetts' interests in this case should, however, be from the perspective that the damage limitation is not confined to wrongful deaths resulting from medical malpractice but applies to all wrongful deaths however caused. Thus, any interest Massachusetts has in keeping medical liability insurance premiums down so as to avoid passing the in-

creased costs on to Massachusetts citizens in the form of higher medical fees is simply one facet of whatever larger interest it may have in limiting in death as distinguished from personal injury cases the size of damage recovery against its citizens generally.[8] *See Tiernan* v. *Westext Transport, Inc.*, 295 F. Supp. 1256, 1264 (D. R.I. 1969).

That interest we think the New York courts would say is one not based upon logic, reason or social policy, but is really the vestigial remains of the mistaken view that there was no common law action for wrongful death. We say "mistaken," for Massachusetts has only recently held precisely that, as of now "the right to recovery for wrongful death is of common law origin . . .," *Gaudette* v. *Webb*, — Mass. ——, 284 N.E.2d 222, 229 (1972), relying upon the late Mr. Justice Harlan's landmark opinion in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) (wrongful death action lies under general maritime law for death caused by violation of maritime duties). In any event, it is our considered view that the New York Court of Appeals would view the Massachusetts limitation, in the words of Justice Hatch (note 3 *supra*), as so "absurd and unjust" that the New York policy of fully compensating the harm from wrongful death would outweigh any interest Massachusetts has in keeping down in this limited type of situa-

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[8] If this case presented the converse fact situation where the decedent was a Massachusetts domiciliary and defendant doctor and hospital New York based, it is by no means clear a New York court would apply the Massachusetts wrongful death limitation. For, in addition to its interest in providing adequate compensation to those New York domiciliaries who suffer a wrongful demise, the unlimited nature of the possible recovery in New York can be said to deter resident doctors and medical facilities from acts of malpractice. Thus, New York would have an interest in regulating the conduct of the tortfeasors and "it would be almost unthinkable to seek the applicable rule in the law of some other place." *Babcock* v. *Jackson*, 12 N.Y.2d 473, 483, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 751 (1962).

tion the size of verdicts (and in some cases insurance premiums). If as *Kilberg* pointed out, "The absurdity and injustice [of wrongful death recovery limitations] have become increasingly apparent [since 1894] . . . .," 9 N.Y.2d at 40, 172 N.E.2d at 528, 211 N.Y.S.2d at 136, since *Kilberg* they have become even more so. Since *Kilberg*, a number of states have repealed their wrongful death limitations or increased the amounts so that at the present time there are only seven which have an outright limit,[9] although some jurisdictions place a limit on a component of the damages[10] and various states impose a limit in suits against certain governmental bodies.[11] Indeed, Massachusetts itself recently increased its limits.[12] Our examination indicates that Massachusetts is unique, moreover, in both imposing minimum and maximum damage limitations and assessing damages in proportion to the degree of the

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[9] *See* Colo. Rev. Stat. Ch. 41, art. 1 § 3 (1963) ($45,000 limit if decedent left no depedent relative; otherwise unlimited recovery); Kan. Stat. Anno., ch. 60, § 1903 (1970) ($50,000 limit); Mo. Rev. Stat. § 537.090 (1966) ($50,000 limit); N.H. Rev. Stat. Anno., ch. 556, § 13 (1971) ($30,000 unless decedent left a relative in which case the limit is $120,000); Va. Code, § 8-636 (1968) ($25,000 limit if no evidence of pecuniary loss to the survivors; a $75,000 limit if there is such evidence plus funeral and medical expenses of deceased); Michie's West Va. Code, ch. 55, art. 7 § 6 (1965) ($10,000 limit if no evidence of pecuniary loss to the dependent survivors; a $110,000 limit if there is such evidence).

[10] *E.g.*, Michie's Md. Code, art. 93 § 4-401(n) (1971) ($2,000 limit on recovery for funeral expenses); Wis. Stat. § 895.04 (1971) ($5,000 limit on recovery for loss of consortium).

[11] *E.g.*, S.C. Code of Laws, tit. 33, § 926 (1962) ($5,000 limit for wrongful death action against a county based on defectively maintained roads).

[12] *See* 7A Mass. Anno. Laws ch. 229, § 2 (Supp. 1971) ($5,000 to $100,000 limit depending on tortfeasor's degree of culpability).

wrongdoer's culpability.[13] Thus, the "absurdity and injustice" of death recovery limitations in general is heightened insofar as Massachusetts is concerned, because it relates damages recoverable not to the damages sustained, but to the degree of culpability, however that can be measured, on the part of the defendant.[14] A respected, famous surgeon like Dr. Warren might well be held liable, were the Massachusets statute applicable, for only $5,000 in damages, regardless of the damages sustained by the decedent's survivors. Thus the anachronistic concept[15] embodied in the Massachusetts act is hardly one that the New York courts can be expected to embrace in the case of the death of a New York domiciliary with whose wife and children New York is "vitally concerned . . ." *Miller* v. *Miller*, *supra*, 22 N.Y.2d at 18, 237 N.E.2d at 880, 290 N.Y.S.2d at 739. The New York policy favors "a just recovery" and "principles of fair play," *MacKendrick* v. *Newport News Shipbuilding & Dry Dock Co.*, 59 Misc. 2d 994, 1011, 302 N.Y.S.2d 124, 140-41 (S.Ct. 1969), that is to say, the "just, fair and practical result." *Neumeier* v. *Kuehner*, *supra*, 31

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[13] Alabama assesses damages in proportion to the culpability of the tortfeasor but has no limit on maximum recovery. *See* S. Speiser, Recovery for Wrongful Death 71 (1966).

[14] After all, as Mr. Justice Reed said in *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 460 (1947), "Death is the supreme personal injury." Nevertheless, in Massachusetts,

> Whatever [the] variances now are or in the past have been, all the [Massachusetts] death statutes have this common, uniform and unaltered characteristic that the amount recoverable is fixed, not on the theory of compensating the surviving relatives of the deceased, but solely on the basis of the quantity of guilt of the defendant under the circumstances of the killing.

Porter v. *Sorell*, 280 Mass. 457, 460, 182 N.E. 837, 838 (1932).

[15] "If a man destroy the eye of another man, they shall destroy his eye." R.F. Harper, The Code of Hammurabi, King of Babylon § 196 (2d ed. 1904).

N.Y.2d at 127, 286 N.E.2d at 457, 335 N.Y.S.2d at 69, which would not be furthered by applying the idiosyncratic Massachusetts law here. Our educated guess as to what the New York courts would do is to follow *Kilberg* and *Miller* and the teachings of *Long*, and apply the New York law of damages.

The constitutional argument, skillfully set forth in the dissent, was not raised by the parties below or on this appeal. We believe that in this case, like *Pearson* v. *Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962) (en banc), *cert. denied*, 372 U.S. 912 (1963), New York has a significant interest—its domiciliary is the one who died and his next of kin are New York's charges—and the "incident" in Massachusetts is not purely "a local one," *id.* at 561, since the decedent was from out of state, and the defendant hospital is a national one in terms of its patients, its staff, its reputation and its efforts to obtain out-of-state contributions. In these circumstances, the refusal by New York to apply the Massachusetts death act's qualitative and quantitative limitations, even as it applies the remainder of the death act, is not so unreasonable as to violate the full faith and credit clause, 309 F.2d at 561; *see* Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9, 13-15, 75 (1958); 63 Colum. L. Rev. 133, 141-44 (1963). *Compare Home Insurance Co.* v. *Dick*, 281 U.S. 397 (1930). The fact that Massachusetts was the situs of the tort and the residence of the defendant would not be sufficient to require as a matter of full faith and credit that the limitations in the Massachusetts law control, in light of the very strong New York policy against wrongful death limitations in connection with its citizens and next of kin and in light of the interstate aspects of the transaction. *Pearson* established that the Massachusetts death statute could be constitutionally sued upon in New York absent its penal quality and its damage limitations. Given a legitimate forum

state interest—as is here present—we see no *constitutional* difference between death on the *Pearson* airplane, death in a taxicab on the way from the airport and death on the operating table.

We agree with the court below and affirm the judgment.

LUMBARD, *Circuit Judge*—(dissenting):

The majority has concluded that the New York courts, on the facts of this case, would refuse to apply the Massachusetts wrongful death damage limitation. Accordingly, it has held that the federal district court, sitting in diversity, correctly refused to apply the Massachusetts damage limitation. From this holding I must dissent both because I do not agree that this is a proper appraisal of applicable New York law and because I believe that the full faith and credit clause of the United States Constitution bars the New York courts, and federal district courts sitting in diversity, from refusing to apply the Massachusetts limitation on the facts of this case.

In effect, the majority has concluded that, as a matter of policy, the New York courts would decline to apply such a damage limitation when the plaintiff, or the decedent, is a New York resident. Although such a *per se* rule would be consistent with the dictum of the New York Court of Appeals in *Kilberg* v. *Northeast Airlines,* 9 N.Y. 2d 34, 172 N.E. 2d 526, 211 N.Y.S. 2d 133 (1961), it flies in the face of the interest-analysis approach to conflict of laws issues later embraced by that court in *Babcock* v. *Jackson,* 12 N.Y. 2d 473, 191 N.E. 2d 279, 240 N.Y.S. 2d 743 (1966), and subsequent decisions. As this court noted in *Gore* v. *Northeast Airlines,* 373 F. 2d 717, 723 (1967), these later decisions "have created doubt as to the continued vitality of the *Kilberg* doctrine in New York despite citations approving its validity in the opinions of these cases." In-

deed, these subsequent cases have sought to cast *Kilberg* in an interest-analysis light, and have cited the minimal interest that Massachusetts, in that case, had in the application of its law, in light of the mere fortuity that the airplane there happened to crash in Massachusetts, in contrast with the more substantial New York interest based on the facts that the journey during which the mishap occurred began in New York, the ticket was purchased in New York, and plaintiff and decedent were both New York residents.

The majority purports to decide this case on interest-analysis grounds. However, the sole interest that it has found in New York emanates from the facts of plaintiff's and decedent's New York residence. Such an analysis simply proves too much; for it is tantamount to a *per se* rule that the courts will not apply such foreign damage limitations when the plaintiff is a resident of the forum state. Thus, I believe the majority's approach amounts to an insupportable abandonment of interest-analysis principles with regard to foreign damage limitations.

Appellee has correctly noted that the New York courts have never honored a foreign damage limitation such as that in issue. However, it is also true that the New York courts have never considered a case in which the interests of New York, in relation to those of the foreign state, were as minimal as they are here. The incident at the root of this litigation, the alleged malpractice of Dr. Warren, does not have the inter-state flavor of the *Kilberg* facts—death caused while in transit from one state to another. Here the decedent made a deliberate choice to undergo the operation in Massachusetts at defendant hospital. Hence, he journeyed into Massachusetts and registered in defendant hospital where he was under the care of defendant, Dr. Warren. The alleged negligence that resulted in decedent's death, the operation by Dr. Warren, occurred wholly within Massachusetts under the care of

Massachusetts residents and in a Massachusetts institution. New York's only connection with this occurrence was the patient's permanent residence in New York. I do not see that New York's interest in this occurrence is enhanced by the fact that this Massachusetts physician and Massachusetts institution have such an eminent reputation that a substantial number of their patients, many from New York, are not Massachusetts residents and choose to come into Massachusetts and undergo treatment there; for there is no evidence that either defendant solicited patients from outside Massachusetts—their popularity is due solely to their reputation and the choice of the individual patients.

In my opinion the Massachusetts interests and contacts with the occurrence underlying this litigation should predominate. In addition to its interest in protecting its citizens and institutions from excessive recoveries, an important consideration behind the Massachusetts limitation is its policy of keeping liability premiums as low as possible for its residents. The significant differential that the majority has noted between malpractice insurance premiums in New York and those in Massachusetts is some testimony to the success of this policy. This interest of Massachusetts is fortified by the fact that the insurance policy from which any recovery will be paid was issued in Massachusetts. The fact that the policy has no coverage limitation in wrongful death cases, as noted by the majority, is irrelevant; for the difference in premiums makes it clear that the Massachusetts damage limitation is considered by insurance companies in calculating premiums for liability insurance issued in Massachusetts. Therefore, if we are to take the New York courts at their word that they follow an interest-analysis approach to torts conflict of laws problems, I can see no escape from the conclusion that Massachusetts interests predominate here and that the New York Court would on these facts be impelled to apply the Massachusetts damage limitation.

This court, in *Ciprari* v. *Servicos Aeroes Cruzeiro*, affirming 359 F. 2d 855 (1966), 245 F. Supp. 819 (S.D.N.Y., 1965), had occasion to consider whether the New York courts would apply a foreign damage limitation in a case in which the interests of the foreign state were substantial. We held that the damage limitation was applicable. The majority, however, suggests that *Ciprari* is no longer correct because that case relied on *Dym* v. *Gordon*, 16 N.Y. 2d 120, 209 N.E. 2d 792, 262 N.Y.S. 2d 463 (1965), which has since been substantially discredited. See *Tooker* v. *Lopez*, 24 N.Y. 2d 569, 249 N.E. 2d 394, 301 NYS 2d 519 (1969). But a reading of *Ciprari* reveals that the court there relied on the entire line of cases developing the interest-analysis approach in New York, and that *Dym*, as then the most recent case in that line, was only one of many cases cited. And, in fact, the interests of the foreign state relative to those of New York were even greater in *Ciprari* than in *Dym*. Therefore, in the absence of any criticism of our *Ciprari* holding by the New York Court of Appeals, I would not abandon our analysis in that case, as the majority appears to do, and would reach the same conclusion we reached in *Ciprari*—that the New York Court would apply the foreign damage limitation.

In any event, even if the majority were correct that the New York courts would refuse to apply the Massachusetts damage limitation against a New York plaintiff, I would hold that such an approach, when applied to a case in which the contacts with Massachusetts are as great as they are here, violates the full faith and credit clause of the United States Constitution. In *Pearson* v. *Northeast Airlines*, 309 F 2d 553 (en banc) (1962) Cert. den. 372 U.S. 912 (1962), this circuit held that "the ruling of the New York Court of Appeals in Kilberg was a proper exercise of the state's power to develop conflict of laws doctrine." (p. 556). Thus, there was no breach of the full faith and credit clause when the New York Court ignored

the Massachusetts damage limitation on the *Kilberg* facts. However, the majority in *Pearson* explicitly recognized that, in a case in which the Massachusetts interests were greater relative to the New York interests, it would be a constitutional violation for the New York courts to refuse to honor the foreign damage limitation. In this regard, Judge Kaufman wrote for the majority:

> We may concede that the Wrongful Death Statute of Massachusetts, almost certainly designed with an end toward the regulation of occurrences transpiring wholly within Massachusetts, should be honored fully and completely when the incident under litigation is a local one. Such, we take it, is the import of Home Insurance Co. v. Dick (citation omitted). But we cannot concede that Massachusetts has a constitutionally protected claim to the unqualified application of its statute in cases where there is an overwhelmingly interstate flavor. (p. 561).

I cannot see how the alleged malpractice and subsequent death of plaintiff's decedent can be classified as anything other than a local incident. Therefore, it appears to me that the clear import of this court's language in *Pearson* is that, in a case such as that presently before us, the full faith and credit clause would mandate the New York courts to apply the Massachusetts Wrongful Death Statute in its entirety, including the damage limitation. Hence, even if the majority and the district court are correct in their appraisal of New York law, the district court was nevertheless in error in refusing to apply the Massachusetts damage limitation to this case.

Accordingly, I would reverse the order of the district court.

Order Docketed as a Judgment.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of February one thousand nine hundred and seventy-three.

71 Civ. 697
Croake J

Present: HON. J. EDWARD LUMBARD
HON. WILFRED FEINBERG
HON. JAMES L. OAKES
Circuit Judges

Elaine Rosenthal, as Executrix of the Estate of Martin C. Rosenthal, Deceased,

Plaintiff-Appellee,

v.

Kenneth W. Warren and New England Baptist Hospital,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Order Docketed as a Judgment.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. Daniel Fusaro,
Clerk.

Docketed As a Judgment on Apr 9 1973
73,329

A true copy,

A. Daniel Fusaro
Clerk

Order Denying Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United State Court House, in the City of New York, on the twenty-firs day of March, one thousand nine hundred and seventy three.

Present: HON. J. EDWARD LUMBARD,
HON. WILFRED FEINBERG,
HON. JAMES L. OAKES,
Circuit Judges.

72-1658

Elaine Rosenthal, as Executrix of the Estate of Martin C. Rosenthal, Deceased,

Plaintiff-Appellee

v.

Kenneth W. Warren and New England Baptist Hospital

Defendants-Appellants

A petition for a rehearing having been filed herein by counsels for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

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Judge J. Edward Lumbard voted to grant the petition for rehearing.

Order Denying Rehearing in Banc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of March, one thousand nine hundred and seventy-three.

72-1658

Elaine Rosenthal, as Executrix of the Estate of Martin C. Rosenthal, Deceased,

Plaintiff-Appellee,

v.

Kenneth W. Warren and New England Baptist Hospital,

Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsels for the appellants and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk